No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,
Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE FREEDOM FOUNDATION AND ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Freedom Foundation ("Foundation") is a non-profit organization based in the states of Washington, Oregon, and California that seeks to advance individual liberty, free enterprise, and limited, accountable government. The Foundation focuses on public sector labor reform through litigation, legislation, education, and community activation. Among other endeavors, the Foundation has worked to protect the constitutional and statutory rights of union-represented public employees and regularly assists employees in understanding and exercising those rights. The Foundation has represented municipal employees, teachers, state workers, and partial-public employees in litigation against labor unions and public employers who have violated employees' rights regarding union membership and dues payment. Based on its extensive expertise in this area, the Foundation possesses a unique understanding of why agency fees disrupt "labor peace" rather than promote it. The Foundation also filed the complaint with the Washington Public Disclosure Commission that ultimately led to a separate lawsuit, *Washington v. WEA*, which was consolidated with *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 185 (2007), before this Court. The Foundation also filed an amicus brief in *Davenport*. Maxford Nelsen is director of labor policy at the Foundation.

Moheb A. Ghali is professor emeritus of economics at Western Washington University. He received his

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Ph.D. from the University of Washington. His fields of interest include econometrics, economic theory and production economics. Professor Ghali has published three books and more than fifty papers in academic journals such as *The American Economic Review*, *Econometrica*, *Review of Economics and Statistics*, *The Quarterly Journal of Economics*, *Economic Development and Cultural Change* and the *International Journal of Production Economics* and has published research on labor strike activity that was funded by the U.S. Department of Labor. He taught econometrics at the University of Gothenburg, Sweden, and at Cairo University, Egypt, as a Senior Fulbright Scholar. He served as president of the International Society for Inventory Research and the Western Association of Graduate Schools. Prior to working at Western Washington University in 1993, Professor Ghali served ten years as University Director of Research at the University of Hawaii, where he won the Board of Regents Distinguished Merit Award and the Economics Excellence in Graduate Teaching Award.

Douglas Wills is Associate Professor of Economics at the University of Washington, Tacoma, where he served four years as Associate Dean of the Milgard School of Business and was repeatedly selected as the school's MBA teacher of the year. His scholarship has been featured in multiple academic journals, including the *Journal of Economic Education*, the *Journal of Economic History*, *Econometric Theory*, and the *Journal of Economic Studies*. He holds a Ph.D. in economics from Texas A&M University and is a Chartered Financial Analyst. Before coming to the University of Washington, Wills was Assistant Professor of Economics and Finance at Sweet Briar College, a financial analyst for Pemberton Security, and a research

economist for the Fraser Institute in Vancouver, British Columbia.

SUMMARY OF ARGUMENT

Recent research shows agency fee provisions undermine "labor peace," rather than promote it.[2] This research shows that states allowing agency fees experience greater labor unrest than "Right-to-Work" ("RTW") states that prohibit agency fees. This constitutes the death knell for the constitutionality of agency fee provisions—which this Court recently called a jurisprudential "anomaly." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012). As a "significant impingement on First Amendment rights," *Ellis v. Brotherhood of Railway Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al.*, 466 U.S. 435, 455 (1984), agency fee provisions are thus left without the compelling state interest necessary for them to withstand constitutional scrutiny. *Knox*, 567 U.S. at 313 (". . . measures burdening the freedom of speech or association must serve a compelling interest and must not be significantly broader than necessary to serve that interest").

In *Abood v. Detroit Board of Education*, this Court held that a state can compel public employees to fund certain union activities because doing so served the compelling state interest of promoting "labor peace" and avoiding so-called "free riders." 431 U.S. 209,

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[2] Nelsen, Maxford. "The Effect of Agency Fees on Labor Peace in Public Employment Relations." The Freedom Foundation. Nov. 2017. Available at https://www.freedomfoundation.com/wp-content/uploads/2017/12/The-Effect-of-Agency-Fees-on-Labor-Peace-in-Public-Employment-Relations.pdf (last visited December 4, 2017).

224 (1977).[3] Although labor peace is often associated with preventing rival unions, this Court also acknowledged that "industrial peace and stabilized labor-management relations" are included within the phrase's scope. *Abood*, 431 at n. 20. *See also, Wisconsin Education Association Counsel v. Walker*, 705 F.3d 640, 655 (7th Cir. 2013) (discussing work stoppages in context of labor peace); *United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada, Local Union No. 342 v. Bechtel Const. Co.*, 128 F.3d 1318, 1324 (9th Cir. 1997) (work stoppages constitute a threat to labor peace). The question of whether agency fees promote labor peace is more empirical than legal, and yet surprisingly little study of the issue has previously occurred, despite the fact that RTW laws banning such requirements are now on the books in 28 states. If agency fees stabilize labor-management relations, as assumed by courts for years, there should be a strong correlation between the presence of labor peace and states that permit agency

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[3] This Court already dispelled the myth that avoiding "free riders" constitutes a compelling state interest. *Harris v. Quinn*, 134 S. Ct. 2618, 2636 (2014) ("The mere fact that nonunion members benefit from union speech is not enough to justify an agency fee because private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for.") (Internal citations omitted.). Further, no union has ever shown that it could not perform its statutorily-mandated function without the imposition of an agency fee. *See, e.g., Id.* at 2641 ("The agency-fee provision cannot be sustained unless the cited benefits of personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join. No such showing has been made."). Other examples include right-to-work states and federal employment, where unions continue to function without the special privilege of an agency fee.

fees. But the evidence presented herein demonstrates that agency fee states experience more labor unrest than states with "RTW" laws.[4]

Further, even if factors other than a state's agency-fee status account for the different levels of labor peace, this indicates that public employers have other means at their disposal for ensuring labor peace that are less restrictive of First Amendment freedoms than compelling public employees to pay union dues or fees under a union security provision.

Agency fees are either unconstitutional because they serve no compelling state interest or because they are significantly broader than necessary to serve any possible state interest. Either way, should this Court overrule *Abood*, it can do so with the confidence that labor-management relations will not be negatively affected.

ARGUMENT

Agreements between public employers and unions that require as a condition of employment the payment of union dues or dues-equivalent fees ("agency fee provisions") have been held by this Court to be a constitutional infringement on public workers' First Amendment freedoms because they serve the compelling state interest of promoting labor peace. *Abood*, 431 U.S. at 224; *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302-03 (1986) (". . . the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding

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[4] "Right to work" laws prohibit an employer and union from entering into an agreement requiring employees to pay union dues or fees as a condition of employment.

its limited infringement on . . . constitutional rights").[5] That this claim is true has never been examined in depth by this Court. But forty years after *Abood* the evidence is in, and there is no reason to believe agency fee provisions promote "labor peace." In fact, it's likely agency fees actually undermine it.[6]

This brief summarizes the findings of a recent report that examined information compiled in two federal databases of union strikes—one maintained by the Bureau of Labor Statistics ("BLS") and the other by the Federal Mediation and Conciliation Service ("FMCS")—to compare the degree of labor unrest in states with and without RTW laws, as measured by the frequency of union strikes and work stoppages.[7]

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[5] Avoiding "free-riders" has also commonly been cited as a compelling state interest justifying agency fee provisions, but the "mere fact that nonunion members benefit from union speech is not enough to justify an agency fee because private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." *Harris*, 134 S. Ct. at 2636. Additionally, unions representing federal employees, for whom agency fees are unlawful, are no less able to perform their required duties than unions representing state workers in non-right to work states. Also, no public employee union in a non-right to work state has yet shown that it would be unable to perform its required duties absent an agency fee.

[6] Although "labor peace" is often associated with preventing rival unions, this Court also acknowledged that "industrial peace and stabilized labor-management relations" are included within the phrase's scope. *Abood*, 431 at n. 20. *See also, Walker*, 705 F.3d at 655 (discussing work stoppages in context of labor peace); *Bechtel Const. Co.*, 128 F.3d at 1324 (work stoppages constitute a threat to labor peace).

[7] Nelson, Maxford. "The Effect of Agency Fees on Labor Peace in Public Employment Relations." The Freedom Foundation. Nov. 2017. Available at https://www.freedomfoundation.com/wp-conte

Since no comprehensive strike database exists, these two government datasets are the best sources of strike activity to study. Both are large enough to provide a representative sampling of strikes in states around the country in both the public and private sectors and in RTW and agency-fee legal environments. The BLS database includes strikes involving more than 1,000 workers and is compiled by bureau staff from public news and media reports.[8] The FMCS database includes strikes and work stoppages in which the agency has been involved.[9] The data indicate that public workers in states that allow agency fees go on strike at significantly higher rates than their counterparts in RTW states.

Additionally, analysis of Gallup survey data indicates that public employee engagement at work is significantly higher in RTW states than in agency fee states.[10] The notion that agency fees promote labor peace is a myth.

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nt/uploads/2017/12/The-Effect-of-Agency-Fees-on-Labor-Peace-in-Public-Employment-Relations.pdf (last visited December 4, 2017).

[8] The Bureau of Labor Statistics strike database is titled, "Work stoppages involving 1,000 or more workers, 1993-2016." Last updated on Feb. 15, 2017. Available at http://www.bls.gov/wsp/monthly_listing.htm (last visited December 4, 2017).

[9] The Federal Mediation and Conciliation Service strike database is available in Microsoft Excel file format on the FMCS website under "Work Stoppage Data." Available at https://www.fmcs.gov/resources/documents-and-data/ (last visited December 4, 2017).

[10] Gallup's 2016 report by managing partner Jon Clifton is entitled, "State of Local and State Government Workers' Engagement in the U.S." The full report is not available online, but is provided by Gallup upon request. A summary of the report and request form are available at http://news.gallup.com/

It is time for this Court to reexamine the unfounded claim that agency fees promote labor peace. The constitutional infringement of millions of public workers' First Amendment rights is built on a house of cards—one that can no longer be constitutionally tolerated given the evidence. As a "significant impingement on First Amendment rights," *Ellis*, 466 U.S. at 455, agency fee provisions are thus left without the compelling state interest necessary for them to withstand constitutional scrutiny. *Knox*, 567 U.S. at 313 (". . . measures burdening the freedom of speech or association must serve a compelling interest and must not be significantly broader than necessary to serve that interest"). The best available evidence shows that agency fees are (1) not justified by a compelling state interest; and, (2) significantly broader than necessary to serve any possible state interest.

I. AN ANALYSIS OF TWO FEDERAL DATABASES OF STRIKES AND WORK STOPPAGES INDICATE RIGHT-TO-WORK STATES EXPERIENCE GREATER LABOR PEACE THAN AGENCY-FEE STATES.

A. Data compiled by the Bureau of Labor Statistics database indicate workers in states that allow agency fees strike significantly more than workers in RTW states.

The BLS maintains a database of strikes and work stoppages involving 1,000 or more workers since 1993, gathered from public news sources. Strikes by union-

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reports/193067/state-local-state-government-workers-engagement-2016.aspx (last visited December 4, 2017).

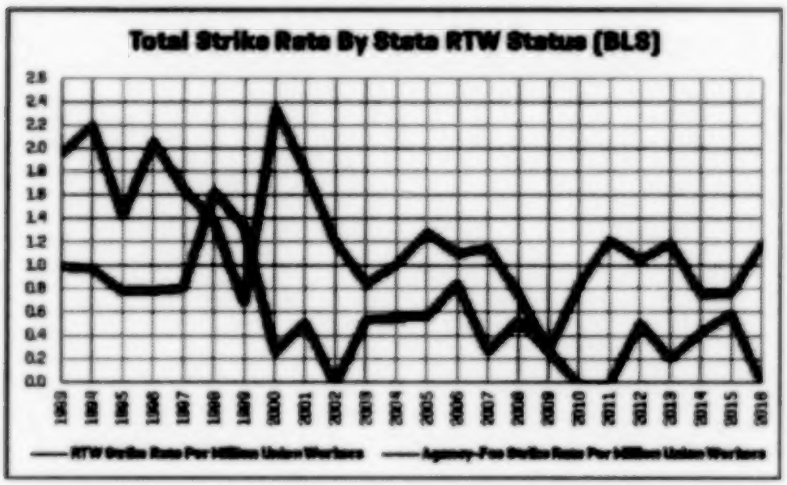
represented employees in both the public and private sectors are included in the database.

Findings: All Strikes

1. The database records a total of 472 strikes occurring between 1993 and 2016. Of these, 52 strikes took place in RTW states while 420 took place in agency-fee states.

2. On average over the period, RTW states experienced 0.57 strikes per year for every million union workers, while agency-fee states experienced 1.28 strikes per year for every million union workers. Union workers in agency-fee states went on strike at 2.25 times the rate of union workers in RTW states.

3. Union workers in RTW states went on strike at a lower rate than union workers in agency-fee states in 22 of the 24 years in the database period.



4. Average strike duration in RTW states (41 days) was 86.36 percent longer than the average strike duration in agency-fee states (22 days).

5. However, strikes in agency-fee states idled twice as many employees on average (4,914) than strikes in RTW states (2,440 employees idled).

By these measurements, labor unrest in the form of strikes and work stoppages appears to be substantially more common in states that permit agency fee provisions than in states that ban such mandatory dues requirements.

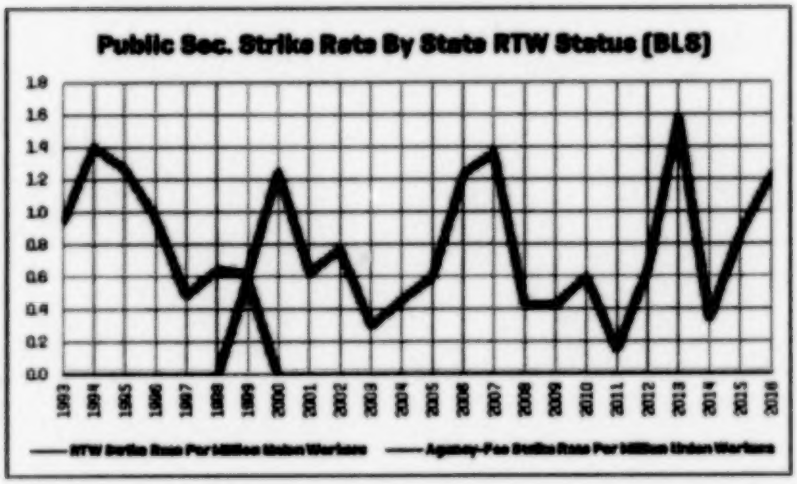
The issue of labor peace at hand in the instant case, however, pertains not to all union activity, but only to labor relations in public employment. An examination of only the public employee strikes listed in the BLS database further reinforces the above findings.

Findings: Public Employee Strikes

1. The BLS database records a total of 122 strikes by state and local government employees between 1993 and 2016. Only one strike by public employees occurred in a RTW state while 121 occurred in agency-fee states.

2. On average from 1993-2016, RTW states experienced 0.03 public-sector strikes per year for every million union-represented government workers, while agency-fee states experienced 0.81 strikes per year for every million public-sector union workers. Union-represented government employees in agency-fee states went on strike at 27 times the rate of union-represented public employees in RTW states.

3. Public employees represented by a labor union in RTW states went on strike at a lower rate than their counterparts in agency-fee states in all 24 years in the database period.



B. An analysis of the Federal Mediation and Conciliation Service strike database indicates workers in states that allow agency fees strike significantly more than workers in RTW states.

The FMCS describes itself as "an independent agency whose mission is to preserve and promote labor-management peace and cooperation."[11] Part of FMCS' role is to help mediate between labor and management during strikes and work stoppages.

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[11] Federal Mediation and Conciliation Service. "About Us." Available at https://www.fmcs.gov/aboutus. (last visited December 4, 2017).

The FMCS maintains a database of all strikes and work stoppages with which it has been involved from 1984 to the present. Since passage of the Taft-Hartley Act in 1947, private-sector unions subject to the National Labor Relations Act have been required to notify the FMCS before engaging in a strike or work stoppage. National Labor Relations Act § 8(d)(3). Though government employers and unions do not fall under the same comprehensive reporting requirement, the FMCS frequently provides mediation services as requested during public-sector labor disputes. In other words, the FMCS database should record all private-sector strikes and some public-sector strikes.

In addition to permitting measurement of the strike rate in RTW and agency-fee states, the FMCS database is large enough to give a reasonably accurate idea of the size and duration of strikes, though this data is somewhat less precise than the data on strike frequency. It is easier to correctly report the fact that a strike occurred, for instance, than it is to accurately record the length of the strike and the exact number of employees involved, which may have fluctuated.

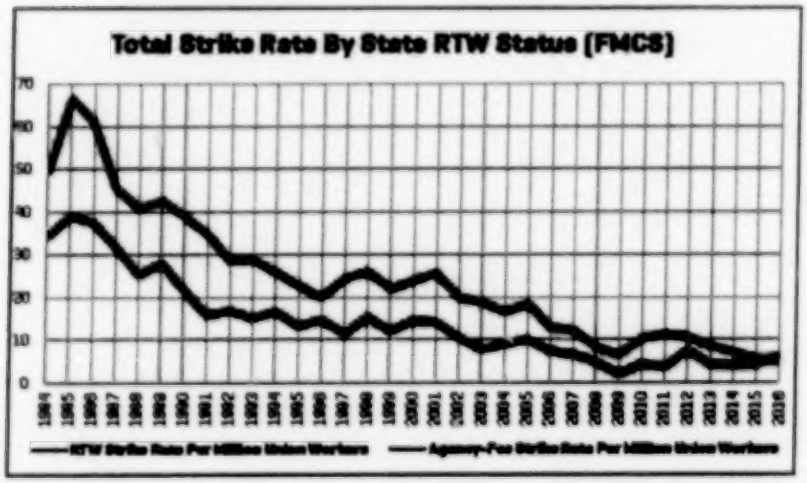
Findings: All Strikes

1. The FMCS database includes a total of 13,956 strikes occurring between 1984 and 2016. Of these, 1,890 strikes happened in RTW states, while 12,066 took place in agency-fee states.

2. On average over the database period, RTW states experienced 14.88 strikes per year for every million union-represented workers, while agency-fee states experienced 24.84 strikes per year for every million union workers. Union

workers in agency-fee states went on strike at 1.67 times the rate of union workers in RTW states.

3. Union-represented workers in RTW states went on strike at a lower rate than union workers in agency-fee states in 32 of the 33 years in the database period.



4. On average from 1984-2016, strikes in agency-fee states lasted for 50 days. With an average duration of 62 days, strikes in RTW states lasted 24 percent longer.

5. Strikes in agency-fee states idled an average of 466 workers, about 3.8 percent more than the 449 workers idled on average in RTW states.

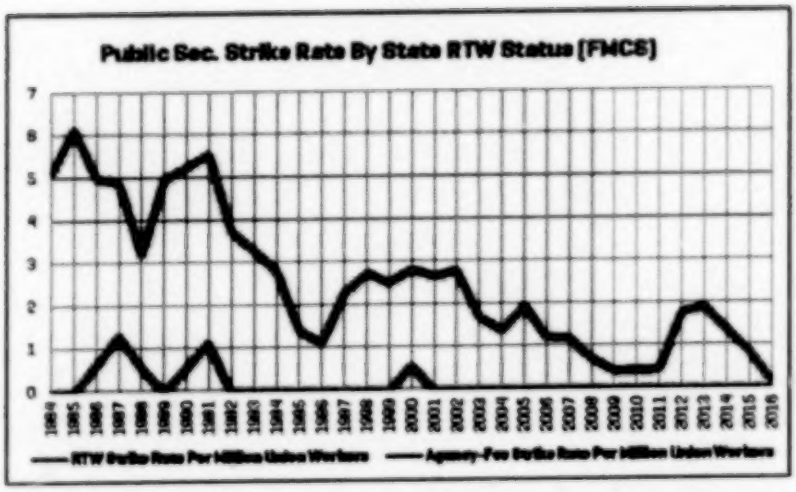
Though the difference in the total strike rate for RTW and agency-fee states as measured by the FMCS dataset is smaller than the difference indicated by the BLS dataset, it is still quite significant. The slightly

smaller strike size in RTW states and significantly lower strike frequency more than offsets the fact that strikes in RTW states tended to last longer than those in agency-fee states.

As with the BLS data, analyzing only public-sector strikes reveals an even starker disparity in the strike rate between RTW and agency-fee states.

Findings: Public Employee Strikes

1. The FMCS database lists a total of 518 public-sector strikes. Of these, a mere eight strikes happened in RTW states while 510 occurred in agency-fee states. FMCS records list only a single public-employee strike that took place in a RTW state since 1992.
2. From 1984-2016, RTW states experienced an average of 0.15 strikes per year for every million union-represented public employees. Agency-fee states experienced, on average, 2.57 strikes per year for every million public-sector union workers. Public-sector workers in agency-fee states went on strike at a rate 17.13 times greater than the rate of their counterparts in RTW states.
3. Government workers in RTW states went on strike at a lower rate than public-sector employees in agency-fee states in all 33 years studied.



4. At 17.3 days, the average public-employee strike in agency-fee states lasted nearly twice as long as the average 8.8-day strike by public workers in RTW states.

5. At 943, the average number of employees idled in public-sector strikes in RTW states was a slight 2.39 percent higher than the agency-fee state average of 921.

Again, it must be remembered that the differences in the results produced by the BLS and FMCS datasets stem from the fact that each record a different collection of strikes and work stoppages. However, both databases support the general conclusion that government workers in RTW states tend to go on strike significantly less frequently than public employees in agency fee states.

Neither the BLS nor the FMCS databases provide complete records of all strike activity. However, they provide two representative samples useful for measuring broader trends.

When all strikes in RTW states are compared to all strikes in agency-fee states, the results are clear: Employees in states where agency fee requirements are permitted go on strike at a significantly higher rate than workers in RTW states where mandatory dues provisions are illegal. While, overall, strikes tend to last somewhat longer in RTW states, strikes in agency-fee states tend to be slightly larger.

This already-noteworthy disparity widens dramatically when the analysis is confined to strikes by public-sector employees, with BLS data indicating government workers in agency-fee states strike at 27 times the rate of workers in RTW states. The FMCS dataset confirms this conclusion, indicating that, while average strike size was effectively the same, public employees in agency-fee states went on strike more than 17 times as often and for twice as long as government workers in RTW states.

C. Other factors that could account for the disparity in strike rates do not support a conclusion that agency-fee provisions promote labor peace.

Several factors could explain the difference in strike rates. One possible explanation is that RTW states tend be more likely to legally discourage public employee strikes. For instance, of the twelve states that specifically permit public employees to go on strike, only one—Louisiana—is an RTW state.[12] On the other hand, some states like New York and Washington that prohibit public employee strikes still

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[12] Sanes, Milla and John Schmitt. "Regulation of Public Sector Collective Bargaining in the States." Center for Economic and Policy Research. Mar. 2014. Available at http://cepr.net/documents/state-public-cb-2014-03.pdf (last visited December 4, 2017).

experience them with some regularity. Further, this would not explain the disparity in private sector strike rates, since strikes by private employees in both RTW and agency-fee states are uniformly governed by the National Labor Relations Act.

Another possible factor could be that unions in RTW states are more hesitant to engage in high-pressure activity that could fracture their membership and cause them to lose dues-payers. If the continued payment of dues by all of its members can be taken for granted, aggressive union leadership or a vocal union minority can lead an entire bargaining unit into a strike with little to lose. If, however, employees wishing to continue serving the public can resign their membership and cross a picket line without consequence, union leadership may choose to employ strikes more judiciously.

Whatever the explanation, the data present no reason to believe that agency fee-requirements for government employees deter strikes and work stoppages in the public sector.

II. GALLUP RESEARCH INDICATES PUBLIC EMPLOYEE ENGAGEMENT AT WORK IS SIGNIFICANTLY HIGHER IN RTW STATES THAN IN STATES THAT ALLOW AGENCY FEES.

The Illinois Attorney General speculates that perhaps extending RTW protections to public employees would create "resentment between those employees who pay [agency] fees and those who do not" that may "[disrupt] the quality of the services provided by the State." Brief of Respondents Lisa Madigan and Michael Hoffman in Opposition to Writ of Certiorari at 8, *Janus v. AFSCME Council 31, et al.*, No. 16-1466.

(U.S. Aug. 11, 2017).[13] But polling data from international performance management consulting company Gallup, Inc., indicate public workers are *more engaged* in RTW states than agency-fee states. In 2016, Gallup released the results of a seven-year study of public employees' engagement at work. Based on the results of Gallup Daily tracking surveys conducted between 2009 and 2015, the report included measurements of public employee engagement in the 43 states with enough survey participants to meet the minimum sample size.

The report divided public employees into the following three categories:

> **Engaged** employees work with passion and feel a profound connection to their company. They drive innovation and move the organization forward.
>
> **Not Engaged** employees are essentially "checked out." They're sleepwalking through their workday, putting time—but not energy or passion—into their work.
>
> **Actively Disengaged** employees aren't just unhappy at work; they're busy acting out their unhappiness. Every day, these workers undermine what their engaged coworkers accomplish.

Of the 43 covered states, 20 had RTW laws on the books and 19 permitted agency-fee requirements throughout the entirety of the survey period. The other four states—Indiana, Michigan, West Virginia and

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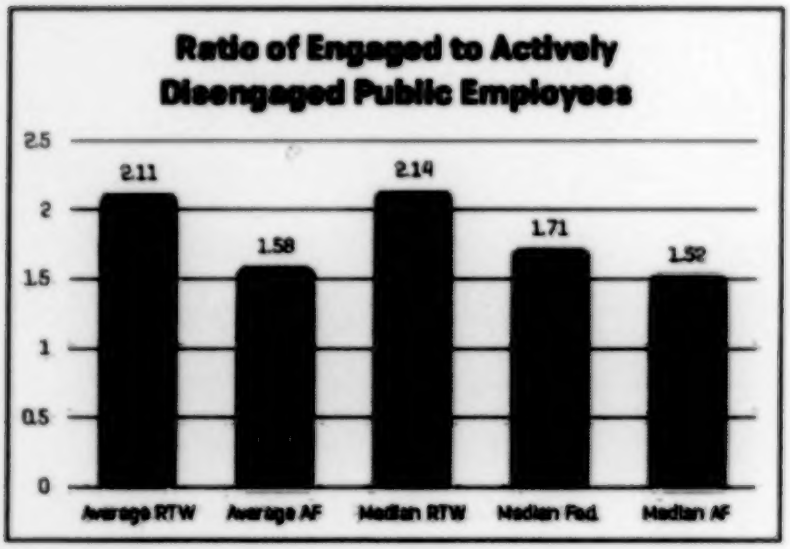
[13] Available at http://www.scotusblog.com/wp-content/uploads/2017/09/16-1466-BIO-madigan-and-hoffman.pdf (last visited December 4, 2017).

Wisconsin—either implemented RTW protections for some or all public employees for the first time part way through the survey period or had no legislation establishing either agency fee requirements or RTW during the survey period. Unless otherwise noted, these four states are excluded for the purposes of this analysis.

Findings: Public Employee Engagement

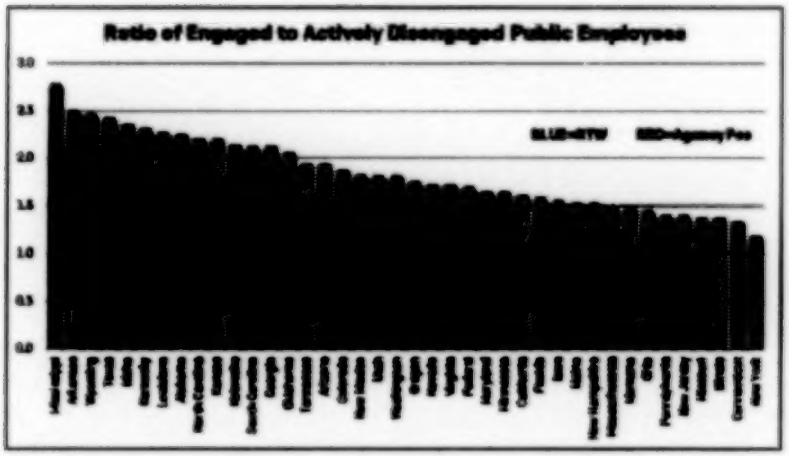
1. The average ratio of engaged to actively disengaged employees was 33.5 percent higher in RTW states (2.11-to-1) than in agency-fee states (1.58-to-1).
2. The median ratio of engaged to actively disengaged employees was 40.5 percent higher in RTW states (2.135-to-1) than in agency-fee states (1.52-to-1).
3. The median ratio of engaged federal workers to actively disengaged (1.71-to-1) was 12.5 percent higher than the ratio for agency-fee states (1.52-to-1). Since passage of the Civil Service Reform Act in 1978, federal employees have benefited from RTW protections.[14]

[14] 5 U.S.C. § 7102.



4. Of the ten states with the best ratio of engaged to actively disengaged employees, only one (Kentucky) had no RTW law in effect during the survey period. The other nine states—including Mississippi, Arkansas, Wyoming, Texas, Idaho, Louisiana, Alabama, North Carolina and Kansas—all had RTW laws on the books well before and completely through the survey period.

5. Every one of the ten states with the worst ratio of engaged to actively disengaged employees—including New Hampshire, Massachusetts, Montana, Ohio, Pennsylvania, New Jersey, Missouri, Illinois, Connecticut and New York—permitted agency-fee requirements throughout the survey period.

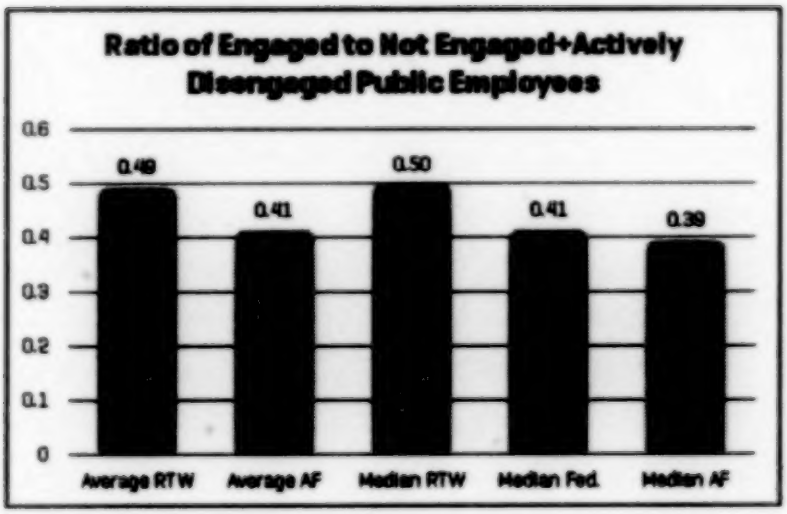


In other words, government employees in RTW states were consistently more likely to be engaged and less likely to be actively disengaged at work than their counterparts in agency-fee states. This trend holds true even when comparing the number of engaged employees to not-engaged and actively disengaged employees combined.

6. The average ratio of engaged to not-engaged and actively disengaged employees was 19.5 percent higher in RTW states (0.49-to-1) than in agency-fee states (0.41-to-1).

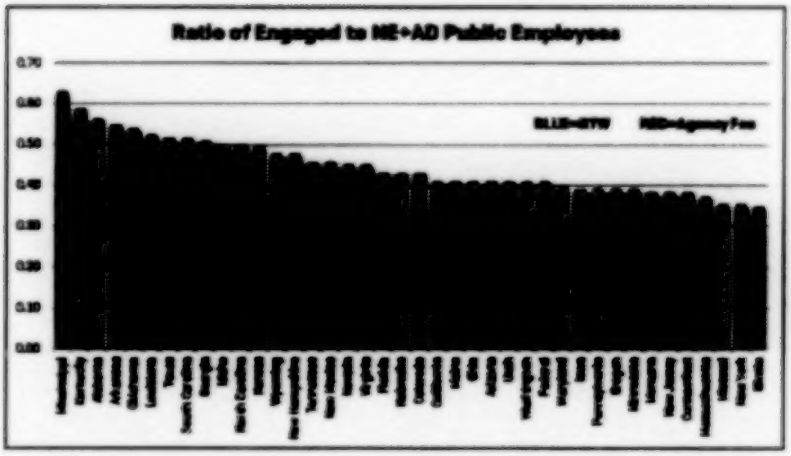
7. The median ratio of engaged to not-engaged and actively disengaged employees was 26.9 percent higher in RTW states (0.495-to-1) than the ratio in agency-fee states (0.39-to-1).

8. The median ratio of engaged to not-engaged and actively disengaged federal employees (0.41-to-1) was 5.1 percent higher than the ratio in agency-fee states (0.39-to-1).



9. Of the ten states with the best ratio of engaged to not-engaged and actively disengaged employees, only one (Kentucky) had no RTW law in effect during the survey period. The other nine states—including Mississippi, Alabama, Arkansas, Oklahoma, Louisiana, Texas, South Carolina, Georgia and Idaho—all had RTW laws in effect throughout the survey period.

10. Each of the ten states with the worst ratio of engaged to not-engaged and actively disengaged employees—including Pennsylvania, Oregon, Minnesota, Montana, New Jersey, Connecticut, Massachusetts, Missouri, New York and Illinois—permitted agency-fee requirements during the survey period.



The difference between RTW and agency-fee states is significant enough that even counting Indiana, Michigan, Wisconsin and West Virginia—which had generally lower levels of employee engagement—as RTW states would not substantially change the results. For instance, at 2.02-to-1, the average ratio of engaged to actively disengaged employees in RTW states would still be 27.8 percent higher than the ratio in agency-fee states (1.58-to-1).

To summarize, public employee engagement at work tends to be significantly higher in RTW states than in states that permit agency fees. States with the highest levels of public employee engagement were almost all RTW, while all states with the lowest levels of government worker engagement permitted agency-fee requirements. Federal employees, who benefit from RTW protections, also tend to be somewhat more engaged at work than their counterparts in agency-fee states. While government unions posit that allowing workers to stop financially supporting the union may lead to resentment from their dues-paying co-workers, it may well be the case that forcing some employees to

pay agency fees against their will is the greater cause of employee resentment and disengagement.

It is important to acknowledge that, for the purposes of this analysis, the relationship between agency-fee states and high strike rates and employee disengagement is purely correlative, not causal. Regardless, the results are so lopsided that even fairly substantial unaccounted-for dynamics or inaccuracies in the data likely would not change the conclusions.

III. AGENCY-FEE LAWS AND PROVISIONS ARE UNCONSTITUTIONAL BECAUSE THEY DO NOT SERVE A COMPELLING STATE INTEREST AND ARE SIGNIFICANTLY BROADER THAN NECESSARY TO PROTECT A STATE INTEREST, IF ANY EXIST.

Agency fees infringe on public workers' First Amendment freedoms. *Ellis*, 466 U.S. at 455. Measures burdening the freedom of speech or association "must serve a compelling interest and must not be significantly broader than necessary to serve that interest." *Knox*, 567 U.S. at 313. Agency fees fail constitutional muster for both reasons.

A. Agency fee laws and provisions do not serve a compelling state interest because they have not been shown to reduce labor unrest.

For decades, unions have championed the cause of "labor peace" as the compelling interest that justifies forcing public workers to fund them as a condition of employment. *See, e.g.*, Brief of Respondents in Opposition to Writ of Certiorari at 2, *Janus v. AFSCME Council 31 et al.*, No. 16 -1466 (U.S. Aug. 11, 2017)

(it is a "longstanding and accepted conclusion that fair-share [agency fee] payments facilitate the State's various recognized interests in fostering 'labor peace' . . ."). [15] But it is unclear how or why the *Abood* court included agency fees under the justification for exclusivity when analyzing the value of "labor peace" which, in *Abood*, primarily related to avoiding rival unions and "the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment." *Abood*, 431 U.S. at 220. [16] Agency fees do not serve the compelling interest of preventing rival unions.

History and this Court have since realized that the agency fee bears no relation to the kind of "labor peace" (supposedly) justified by exclusivity. *See Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014) (". . . a union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked."). Rival unions do not arise in RTW states or in federal employment (where agency fees are unlawful), and no union has ever made a showing that it could not satisfy its statutorily-mandated responsibilities absent the imposition of an agency fee. Thus, the legacy of, and perhaps for unions the purpose of, the agency fee is twofold.

First, unions decrease the number of employee objections by bootstrapping opt-out schemes to the

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[15] Available at http://www.scotusblog.com/wp-content/uploads/2017/09/16-1466-AFSCME-BIO.pdf (last visited December 4, 2017).

[16] This even though millions of employers in the private sector each year seem to do just fine negotiating with individual employees.

justification for the agency fee,[17] collecting significantly more fees than they otherwise would. *See, e.g., Seidemann v. Bowen*, 499 F.3d 119, 125-26 (2d Cir. 2007) (opt-out requirements allow unions to "take advantage of inertia on the part of would-be dissenters who fail to object affirmatively"). But since opt-out schemes automatically deduct *full* union dues, unions also collect significantly more *political* funds than they otherwise would. Second, as shown in this brief, agency-fee requirements may actually facilitate *labor unrest*, which increases a union's bargaining power. But once extracted from exclusivity, the agency fee fails to serve the compelling *state* interest necessary to justify its infringement on the First Amendment freedoms of millions of public workers. *Cf. Elrod v. Burns*, 427 U.S. 347, 362 (". . . care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice.").

Agency fees have always been a constitutional outlier permitted as a special privilege to unions—an act of "unusual" and "extraordinary" "legislative grace,"

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[17] An "opt-out scheme" is when a state deducts full union dues from a public worker (and forwards them to the union) so long as the worker has not objected to union membership and the payment of union dues. This means full dues are deducted from workers with or without their permission so long as they have not objected. Opt-out schemes are commonly employed by states and public sector unions and have never been held unconstitutional, even as to the collection of funds for "nonchargeable" expenses, and courts "have given surprisingly little attention to" them. *Knox*, 567 U.S. at 312. Opt-out schemes "approach, if they do not cross, the limit of what the First Amendment can tolerate," *id.* at 314, yet such schemes are, unfortunately, commonly exploited by unions to fill their political war chests with cash. This Court should end this practice. Unions have no authority to automatically seize or receive union fees which cannot be constitutionally compelled.

Knox, 132 S. Ct. at 2291, which constitutes "the power, in essence, to tax government employees." *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 184 (2007). Data presented in this brief, however, indicate that this "unusual" and "extraordinary" constitutional outlier never served a state interest in the first place. Without "labor peace" as a plausible justification, the agency fee falls through the thin constitutional ice upon which it has been skating for forty years.

Further, even if there were no discernible difference between labor peace in RTW states and agency-fee states, agency fees would still be unconstitutional because they do not *promote* labor peace, while they obviously infringe on public workers' First Amendment rights. At best, agency fees have no effect on labor peace. At worst, they contribute to labor unrest. Either way, agency fees do not serve a compelling state interest.

It is a "bedrock" constitutional principle that "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. Agency fees defy this bedrock principle. Agency fees fail to serve a compelling state interest and are, for that reason alone, unconstitutional.

B. Agency fee laws and provisions are unconstitutional because they are significantly broader than necessary to serve a compelling state interest, if one exists.

Infringements of First Amendment freedoms are unconstitutional if the government's interests can be "achieved through means significantly less restrictive

of associational freedoms." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "Even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973). The means employed by government to serve its compelling interest must be the option "least restrictive of freedom of belief and association. . . " *Elrod*, 427 U.S. at 363. Even if the agency fee somehow promoted "labor peace," which it does not, or had merely neutral effects, labor peace can be achieved through means less restrictive of constitutionally protected liberty.

The data indicate that labor peace is more present in RTW states or, in the least, labor peace is no worse in RTW states than in agency-fee states. Thus, something other than agency fees must account for the labor peace experienced in RTW states. Further, something other than agency fees must account for the increased level of public workers' engagement in RTW states as opposed to agency-fee states.

As discussed above, one possible explanation for the disparity in strike activity between RTW and agency-fee states is that RTW states are more likely to legally prohibit or penalize public employee strikes. Other policy differences may exist as well that help to curb labor unrest. Some states set narrow parameters over the types of subjects unions can bargain over, while others are far more permissive. Some states require negotiations between unions and public employers to be open to public observation, while many conduct negotiations behind closed doors. Indeed, state governments have great flexibility to calibrate their collective bargaining laws as they see fit. Some choose not

to permit public sector collective bargaining at all.[18] Even if agency-fee requirements have no effect on labor relations, the fact that RTW states generally have fewer strikes and more engaged employees than agency-fee states indicates that states and public employers have other means at their disposal for ensuring labor peace that are less restrictive of First Amendment free speech and association rights than compelling public employees to pay union dues or fees under a union security provision. Agency-fee laws and provisions are, for that reason alone, unconstitutional.

CONCLUSION

This Court should reverse the Seventh Circuit's decision.

Respectfully submitted,

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[18] Abraham, Priya. "Transforming Labor: A Comprehensive, Nationwide Comparison and Grading of Public Sector Labor Laws." The Commonwealth Foundation. Oct. 2016. Available at https://www.commonwealthfoundation.org/docLib/20161027_TransformingLaborPolicyReport.pdf (last visited December 4, 2017).